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In the Supreme Court
of the United States

OCTOBER TERM, 1968

CASE NO. 747

STRUCTURAL LAMINATES, INC.
a corporation,

Petitioner,

v.

DOUGLAS FIR PLYWOOD ASSOCIATION,
a corporation,

Defendant.

PETITION FOR CERTIORARI

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MISCELLANEOUS

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the United States District Court for the District of Oregon.

OPINIONS BELOW

The opinion, findings of fact, and judgment of the United States District Court is printed in appendix A hereto, infra page 15. The opinion, findings of fact, and judgment are reported at 261 F.S. 154 1966).

The opinion of the Ninth Circuit is printed in appendix B hereto, infra page 31.

JURISDICTION

The judgment of the Court of Appeals of the Ninth Circuit was entered and filed the 23rd day of July, 1968. A Petition for Rehearing was denied by Order of the Court of Appeals of the Ninth Circuit on August 21, 1968.

The jurisdiction of the Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. What are the duties of a trade association which undertakes to prepare, formulate and solicit acceptance of a Commercial Standard.

a) If the proof is that the product is suitable for inclusion in the Commercial Standard, does its exclusion constitute a per se violation?

b) If the proof is that the product is suitable for inclusion in the Commercial Standard, does proof of simple negligence constitute a violation of the anti-trust laws?

c) If the proof is that the product is suitable for inclusion in the Commercial Standards, must the plaintiff prove a specific intent on the part of the defendant to restrain competition?

2. Whether the finding of no misrepresentation by the Court below was clearly erroneous.

STATUTES INVOLVED

15 U.S.C. § 1.
15 U.S.C. § 15.
28 U.S.C. § 1291.

STATEMENT OF THE CASE

Petitioner, Structural Laminates, brought this action to recover treble damages under § 4 of the Clayton Act. 15 U.S.C. § 15. Petitioner alleged that defendant, a trade association of plywood manufacturers, conspired with its members to restrain trade by eliminating 3½-ply ½-inch sheathing plywood from the market thereby causing damage and eventual destruction of petitioner's business (R. p. 216).

Defendant denied the alleged conspiracy or that any damages resulted therefrom and further contended that petitioner's claim was barred by the statute of limitations (R. pp. 223-224).

The District Court entered judgment for defendant on the ground that petitioner failed to prove a violation of § 1 of the Sherman Act, 15 U.S.C. § 1.

The District Court also stated in its findings that even if defendant had violated the Sherman Act, such violation was not the proximate cause of damage to petitioner's business (Op., R. pp. 281-295). The appellate court affirmed the trial court's decision.

Petitioner constructed a plywood sheathing mill in Beaverton, Oregon in late 1957. The principal design feature of the plant was a kiln type dryer which was only efficient for drying veneers thicker than 1/10 inch. It was this feature which made the plant primarily a 3 ply ½ inch plywood sheathing mill. This plywood was made of three pieces of 1/6 inch veneer. A more conventional construction for ½ inch sheathing plywood was to use five pieces of 1/10 inch veneer (Op., R. p. 281, Tr. pp. 11-18, 457-460).

Defendant is principally engaged in promoting plywood manufactured by its members under its grade trademarks (A.F. 21, R. p. 190). Defendant promoted, by advertising throughout the United States, the use of the Commercial Standards; it printed and disseminated approximately 700,000 copies of the Commercial Standards to plywood dealers and distributors, builders, architects and the like and advocated the use of Commercial Standards to government agencies and building code authorities (A.F. 31, 32, R. p. 194). The defendant also provided a testing and quality control service. It inspected member mills through random sampling. Inspected mills whose products complied with the Commercial Standards, were permitted to use defendant's grade trade marks (Op., R. p. 282).

Commercial Standards are published by the United States Department of Commerce as a service to industry. Although Commercial Standards do not have the force of law, they are a common basis of understanding between plywood manufacturers and buyers. As a consequence, plywood that does not conform with these standards has a limited market and commands a lower price Op., R. p. 283).

Defendant played a dominant role in the formulation and adoption of Commercial Standards for plywood and all subsequent amendments thereto. Its committees have determined the need for such standards, written drafts for them, proposed them to the Department of Commerce and solicited approval not only from defendant's members, but also through the defendant's field organizations from buyers, users and other interested groups. The Department of Commerce relies almost entirely upon defendant for technical advice regarding Commercial Standards for plywood (Op., R. p. 284).

The Department of Commerce will not publish, amend or revise a Commercial Standard until satisfied that it has been approved by manufacturers representing seventy-five per cent (75%) of the industry's production and by a reasonable cross section of buyers, users or other interested groups (Op., R. p. 283). Defendant's members constitute over eighty per cent (80%) of the plywood production in the United States (A.F. 11, R. p. 186).

During the years 1958-1960 plaintiff manufac-

tured 3 ply ½ inch sheathing which complied with all the performance requirements of the Commercial Standards for plywood and was "suitable for inclusion in the Commercial Standards." (Op., R. p. 286-289). Petitioner made repeated requests to defendant during the years 1958 to 1960 that action be taken to amend CS 45-55 to permit 3 ply ½ inch sheathing as a Commercial Standard product[1] (Op., R. p. 287). In 1959 defendant made tests of petitioner's production and found that it met the performance requirements of the Commercial Standards (Op., R. p. 286). The District Court found that:

> "Had the defendant been vigilant, it might have concluded in 1958, or sooner, what it did conclude in 1962 that the bad reputation of 3 ply ½ inch sheathing was unjustified."

Defendant, nonetheless, continued to refuse to admit 3 ply ½ inch sheathing as a Commercial Standard product. Indeed, in 1960 defendant revised the Commercial Standards to remove any ambiguity and to make it abundantly clear that 3 ply ½ inch sheathing was not permissible.

Many plywood manufacturers who were members of defendant opposed 3 ply ½ inch sheathing because it was more difficult to glue because of the thicker 1/6 inch veneers (Op., R. p. 288). These technical difficulties, however, were not insurmountable, but

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[1] The Commercial Standards relevant herein are CS 45 for Douglas Fir, and CS 122 for other western softwoods. Since these two standards are almost identical, future reference will be made.

merely a matter of manufacturing inconvenience. There were Commercial Standard products that were equally, if not more difficult, to manufacture. For example, 5 ply ¾ inch and 1⅛ inch plywood employing 3/16 inch veneers were common market constructions approved by the Commercial Standards. Plaintiff's 3 ply ½ inch sheathing complied with all building requirements of the Commercial Standards (Op., R. p. 286).

Some of the defendant's members, as a part of their operations, necessarily produced large quantities of 1/10 inch veneer of relatively low quality. They would use this veneer in 5 ply ½ inch sheathing and thus had a real economic motive in opposing the widespread use of 3 ply ½ inch sheathing which, as indicated, used the 1/6 inch veneer (Op., R. pp. 286-287).

During this same period of time the defendant actively represented the quality of 3 ply ½ inch sheathing to be inferior and impossible to bond (Ex. 75). A circular which was prepared in 1958 was distributed throughout the nation to defendant's field service personnel who made calls on builders, architects, government agencies and the like. In making these calls defendant's field service men would first present the arguments against 3 ply ½ inch sheathing and if this was not convincing they would present exhibit 75 as a "written brief to support the argument." (Ex. 183(b) pp. 44-47, Ex. 74). These circulars remained defendant's policy statement on 3 ply ½ inch until 1963. The uncontradicted evidence estab-

lishes that defendant conducted a nationwide effort to police the market and to discredit 3 ply ½ inch sheathing. In fact, the executive director of the defendant stated on October 15, 1959, in his speech to plywood manufacturers, that:

> "This is the kind of stuff we are trying to stop, we are going to stop this guy." (Tr. p. 79).

The District Court found that the exclusion of 3 ply ½ inch sheathing from the Commercial Standard limited the market and lowered the price of that product. This coupled with defendant's efforts to discredit 3 ply ½ inch sheathing with plywood buyers and users made it difficult for plaintiff to compete and sell its products (Ex. 79, 186, pp. 8-11; Op., R. p. 285).

Finally in 1963, after petitioner had ceased business, defendant offered an amendment to the Commercial Standards so as to specifically permit 3 ply ½ inch sheathing as a Commercial Standard product. There had been no substantial technological developments in the plywood manufacturing industry between 1958 and 1963 (Op., R. p. 286). In attempting to reconcile the apparent inconsistency, the defendant stated:

> "That the negative aspects of the 3 ply ½ inch construction were rather strongly stated in that letter—somewhat over stated. . . ." (Ex. 110).

REASONS FOR GRANTING THE WRIT

An Important Question of Federal Law Has Been Decided by the Court below Which Has Not Been But Should Be Settled by This Court.

The question presented is whether the innovator can survive in American industry under a congressionally sanctioned scheme of product standardization and grade marking. In this age of mass production techniques, product standardization and grade marking have become a necessary adjunct to industry. The legitimate purposes of standardization are to make products interchangeable, achieve economies in manufacturing and warehousing and to protect the consumer from unsafe and substandard products. However, standardization and grade marking can also be used as a device for stifling competition by artificially or arbitrarily excluding new and good products from the market.

The congressionally sanctioned standardization scheme in issue is the Commercial Standards. These standards are formulated by private industry and then published and promulgated by the United States Department of Commerce.

There are approximately 500 of these standards in existence today covering a broad spectrum of products in the country. For example, there are commercial standards for plywood, lumber, paints, drugs, textiles, rubber products, precious metals, plumbing materials, petroleum products, pulp products, household

supplies, hospital supplies, containers, automotive equipment, chemicals, building products, etc. U. S. Department of Commerce, *List of Product Standards, Commercial Standards and Simplified Practice Recommendations*, 1967.

The method that was followed to develop the Commercial Standards in this case is typical throughout American industry. Although Commercial Standards standing alone have no force of law, they become the common method for specifying product quality and performance in sales contracts and the like. Trade associations are growing in strength and in number, as is their increased use of Commercial Standards as a means of bringing about product standardization. There is thus a corresponding need to regulate their activities under the anti-trust laws.

Trade associations by their very nature are not wholly altruistic. They have their own vested interests which they desire to protect. If a potential competitor or innovator arrives in the market with a new or novel product, his product inevitably constitutes a threat to the old guard. Although the new product may not conform with some artificial or arbitrary specification of some Commercial Standard, it may well be a less costly and better product than was theretofore manufactured. The innovator's efforts to sell and to gain acceptance of his product can be arbitrarily thwarted, if trade associations are allowed uncontrolled discretion in formulating and promoting

Commercial Standards. Merely because trade associations' efforts to develop product standardization may benefit the public is no reason to ignore the fact that standardization may also injure the public by restricting competition. The question for consideration by the Court is what are the duties of a trade association when it undertakes to formulate and promote a Commercial Standard.

This case presents an excellent and concrete vehicle whereby this determination can be made. The relevant facts are undisputed and are part of the lower court's findings. Defendant dominated the formulation, acceptance and promotion of the Commercial Standards for plywood. Petitioner began in 1958 to manufacture a product which, in every respect, *was suitable for inclusion in the Standard*, but was expressly excluded. Petitioner made numerous requests of defendant to have the product included but was refused. Because the petitioner was unable to have its product certified as Commercial Standard, it was forced to sell in a limited market and at a lower price than competing products.

The lower court concluded that there was no "bad motive" or specific intent to restrict competition. It did, however, find that the reason many of defendant's members objected to 3 ply ½ inch was because it was inconvenient to manufacture. Some objected because 3 ply ½ inch posed a competitive threat to their own products. Finally, the lower court found that

had defendant been vigilant it would have concluded that 3 ply ½ inch was suitable for inclusion as early as 1958. In other words, defendant had been negligent in excluding the product from the Commercial Standards.

There are a few lower federal court decisions involving standardization activities by trade associations. All of these cases involve use of standardization as a means of overt price fixing. This is the first case involving both the question of product exclusion and standardization under the Commercial Standards. Considering the increasing prevalence of these Commercial Standards in American industry, the general increase in standardization and grade marking, the need for guidelines as to the duties and liabilities of trade associations engaged in this important activity, the issue is ripe for determination.

A decision here would have a generalized effect throughout many industries and makes its resolution even more important than remedying the specific evil visited upon this petitioner. Trade associations need to know what the potential limits of their responsibility might be. Standardization has become a way of life in American industry. As standardization increases, the ability of the innovator to find a place in the market decreases. This is particularly true where vested interests create commercial standards. Without such innovators, the genius of American industry could well be lost. It is therefore time for this Court to clearly, succinctly and finally carve out and delin-

eate the responsibilities of a trade association vis-a-vis an innovator.

CONCLUSION

For the foregoing reasons this petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION

RUSSELL E. SMITH, District Judge

Plaintiff, Structural Laminates, Inc., brings this action to recover treble damages under Section 4 of the Clayton Act.[1] It claims that defendant, Douglas Fir Plywood Association (DFPA), a trade association, conspired with its member companies to damage and destroy plaintiff's business in violation of Section 1 of the Sherman Act.[2]

Plaintiff completed the construction of a plywood mill late in 1957. It claimed that the mill was designed to produce, from purchased veneer, ½ inch 3-ply sheathing plywood which would be used mainly for construction purposes. This plywood was made of three pieces of relatively low grade veneer, each 1/6" thick. The most commonly used ½" sheathing is made of 5 pieces of veneer, each 1/10" thick. Because plaintiff intended to use the thicker veneer, it designed its mill with a kiln-type dryer instead of the roller dryer almost universally used in the plywood industry.

The gravamen of plaintiff's case, which is based on two somewhat different theories, is that defendant conspired with its members to limit plaintiff's access to the plywood market causing loss of profits to plaintiff and the eventual destruction of its business in No-

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[1] 15 U.S.C. § 15.
[2] 15 U.S.C. § 1.

vember, 1960. The defendant denied the conspiracy, set up the statute of limitations, and claimed that plaintiff's losses were due to the nature of plaintiff's product and a falling market.

The defendant corporation is a trade association organized to promote the sale of plywood. It derives its principal support from members who pay dues based upon the volume of plywood produced by each. In the years important here, defendant's 109 to 128 members manufactured from 82 to 89 per cent of all of the softwood plywood produced in the United States. Defendant spent $3,800,000 in 1958 and $5,200,000 in 1960. About 60 per cent of the money was spent in the promotion of softwood plywood with some special attention to that manufactured by defendant's members, and about 21 per cent in its technical activities, which included a quality control program and research. Defendant had 10 regional offices in the United States and a substantial field staff to man these offices. This staff called upon members, prospective members, and those who used or directed the use of building materials. In its quality control program defendant inspected member mills and sampled member products and it permitted members who met its quality control standards and the commercial standards as well to use defendant's grade-trade stamp and a certificate. These stamps and certificates told the purchaser of plywood that the manufacturing mill had met the defendant's quality control standards and that the product met the commercial standards as well. Defendant has on oc-

casion also permitted the use of its trademark "DFPA TESTED QUALITY" on certain specialized products which have not conformed to the constructions specified in the Commercial Standards. However, no reference has been made on such occasions to any Commercial Standard or conformance thereto. The defendant has a real and legitimate interest in the reputation of plywood.

Commercial Standards are published by the United States Department of Commerce. The Department does not propose standards, and standards when published do not have the force of law. They do reflect the consensus of the industry and when published, become a basis of common understanding in the business involved. Manufacturers of plywood which conforms to the Standard may and do indicate on the product the conformity. Plywood not bearing the marks indicating conformity to the standard is more difficult to sell[3] and brings a lower price.[4]

The Department of Commerce will not publish a Standard or revise a published standard until satis-

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[3] Most state and local building codes require that plywood used for building construction comply with these Commercial Standards. The Uniform Code of the International Conference of Building Officials, the Uniform Code of the Building Officials Conference of America, and the Southern Building Code Conference all specify that plywood used in construction must conform to the Commercial Standards. Likewise, the Federal Housing Administration in its minimum Property Standards requires that all plywood used in FHA insured housing must conform with these Commercial Standards. (Agreed Fact 34)

[4] The evidence here indicates that certified C-D interior sheathing brings about $6.00 per thousand square feet more than the non-certiifed.

fied that it is approved by the industry and other interested groups. Generally the Department requires approval by seventy-five per cent of the producers of the product. The Department sets up the procedure for circularizing the trade and determines which related groups such as consumers and governmental agencies should be consulted.

The defendant has played a dominant role in the adoption of Commercial Standards for plywood. Its committees have determined the need for standards, written drafts of them, proposed them to the Department, and solicited approval by members of the industry. Its technical staff is respected by the Department of Commerce and the industry and its field staff has been able to sell proposed standards and amendments to the industry and other interested persons.

In 1933, defendant proposed the first commercial standard for Douglas Fir Plywood, CS 45-33.[5] At defendant's instance, CS 45 has been revised ten times, most recently in 1963. Defendant has also sponsored several amendments to the various revised standards. In 1945, defendant proposed the first Commercial Standard for Western Softwood Plywood, CS 122-45. At defendant's instance, CS 122 has been revised four times, most recently in 1963. CS 45 and CS 122 are identical in relevant content and so alike in their relevant history that further reference is made only to CS 45.

Plaintiff proceeds on two theories. The first is that

[5] The —33 indicates the year of last revision.

under CS 45-55, 3-ply ½" was a permitted construction if it met the performance tests set out in the Standard, and that the defendant in violation of the anti-trust laws, advised consumers and others to the contrary. The published CS 45-55 contains in a footnote to a table the following:

> "Minimum number of plies required for standard construction:
> 3 plies, for 1/4—, 5/16—, and 3/8 in.
> 5 plies for 1/2—, 5/8—, and 3/4 in.
> 7 plies for 7/8— to 1-3/16 in."

Historically there was reason for excluding 3-ply ½" from the standard. Other footnotes to tables, arranged exactly as the quoted one, definitely specify what does and what does not conform. The trade generally interpreted the standards to exclude 3-ply ½". For these reasons if the standard was ambiguous in the light of its mechanical arrangement or the other language in it, which the court thinks it is not still the court would interpret it to exclude the 3-ply ½" construction.

[1] Prior to November, 1958 the defendant did advise a prospective purchaser of plaintiff's 3-ply ½" plywood that it did not meet the Commercial Standard and thereby killed a sale of about 830,000 square feet. Likewise in the spring of 1958 defendant advised the Federal Housing Administration that 3-ply ½" sheathing did not meet the commercial standards because of drying and gluing difficulties. This advice was solicited by the Federal Housing Administration as a re-

sult of plaintiff's efforts to get the Federal Housing Administration to permit the use of 3-ply ½" in Federal Housing Administration financed construction. These were the only acts of the defendant, assuming arguendo, that the Federal Housing Administration incident was directed at plaintiff, which were specifically directed at plaintiff's sales. Even if the statute of limitations had not run,[6] the defendant properly interpreted the commercial standards and is not liable unless on the other grounds asserted by plaintiff the defendant violated the anti-trust laws.

Plaintiff's second theory is that the defendant used the standards in violation of the anti-trust laws to prevent it from selling its 3-ply ½" and to drive it out of business.

The salient facts are these: The relatively thick veneers (1/6", 3/16", and 1/4") are rough and more difficult to glue than the relatively thin veneers (1/10" and 1/8"). By 1948 when the Commercial Standard definitely excluded the 3-ply ½" construction, it had acquired a bad reputation in the industry because of the bonding difficulties. This bad reputation lasted until 1963.

In the meantime, however, improvements were being made in the plywood manufacturing technology and by 1958, and perhaps earlier,[7] 1/6" veneer could

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[6] 15 U.S.C. § 15b provides a four-year limitation. Both of these acts were complete in 1958. The complaint was filed November 12, 1963.

[7] In the opinion of Ronald A. Whyte who was in charge of the 3-ply ½" testing project for Weyerhaeuser, the indus-

be satisfactorily bonded. Plaintiff was able to, and did, produce ½" 3-ply panels which passed the CS 45-55 performance tests. Defendant in its laboratories tested one batch of panels in the summer of 1959. All panels passed the delamination tests. Over a substantial time the tests conducted in the laboratories of Timber Engineering Company, a reputable testing agency, indicated satisfactory bonding of plaintiff's plywood. There were no substantial changes in technology between 1958 and 1963, and in 1963, on the recommendation of defendant, 3-ply ½" became a permitted construction under CS 45-63. This was after 353 separate tests conducted over a period of 14 months by defendant's technical staff in 1961 and 1962. It was during this same period that Weyerhaeuser was making its similar tests. Prior to 1958, thick veneers were being used in construction approved by the Commercial Standard. There was an approved 5-ply ¾" panel using 3/16" veneers and an approved 1⅛" panel marketed under defendant's proprietory name, "2-4-1," using 1/6" and 3/16" veneers.

Some of the defendant's members, as a part of their operations, necessarily produced large quantities of 1/10" veneer of relatively low quality. This veneer they could use in a 5-ply ½" sheathing and they had a real economic motive in opposing the widespread use of 3-ply ½" sheathing which, as indicated, used the 1/6" veneers.

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try was capable of producing satisfactory 3-ply ½" plywood as early as 1951. It is interesting to note however that as late as 1961 Weyerhaeuser, an important plywood producer, was apparently unwilling to market 3-ply ½" until the completion of a substantial testing program.

Plaintiff, before the period of damage claimed here and continuously afterwards, complained to the defendant, to the Department of Justice, to the Department of Commerce, and to all others who would listen, that its 3-ply ½" product was good and that the standard should be clarified to specifically include it.

If defendant is to be found liable on plaintiff's second theory, it must be by reason of its action or non-action with respect to CS 45. The non-action[8] consisted in failing at plaintiff's request to cause CS 45-55 to be amended to include 3-ply ½" as a permitted construction. The action consisted in procuring amendment number two to CS 45-55.

[2] From the beginning defendant was a dominant force in the creation, amendment and revision of the Commercial Standards, and it is guilty of a violation of the Sherman Act if what was done with respect to CS 45 was unreasonable and done with the intent to restrain trade.

[3] A Commercial Standard must reflect a state of mind in the affected industry. The Department of Commerce will not publish one which is not accepted as satisfactory by the producers and users. There were

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[8] Defendants response to plaintiff's request for a clarification of CS 45 was to propose language which removed any doubt as to the exclusion of 3-ply ½" from the standard. This language was incorporated in CS 45-60, effective Nov. 14, 1960, 14 days before the end of the period for which plaintiff claims damages. Since the language included in the revision did not change anything, it was defendant's failure to seek a change, rather than the change accomplished, which resulted in any damage that plaintiff may have suffered. Even prior to CS 45-60 no testing agency would certify the 3-ply ½" as conforming to the Commercial Standard.

facts indicating that thicker veneers could be satisfactorily bonded. In light of what was known in 1963, it was reasonable in 1958 to include 3-ply ½" as a permitted construction. Some of defendant's members did have a motive for excluding 3-ply ½" from the market. Even so the evidence does not show that as of 1958, 1959 and 1960 the exclusion of 3-ply ½" was either unreasonable or done with an evil intent.

The parties agreed that

> "Prior to 1963, most softwood plywood manufacturers were reluctant to adopt 3 ply ½ inch C-D sheathing plywood as a Commercial Standard construction principally because of technical difficulties in drying thicker veneers and in perfecting a satisfactory adhesive bond between the thicker plies." (Agreed Fact 66)

When CS 45-48 was adopted and 3-ply ½" definitely excluded the reasons for excluding it were entirely legitimate.

In 1958 and 1959 plaintiff was the only producer of 3-ply ½". The industry had had little experience with it using the modern glues. Plaintiff's experience did not necessarily reveal anything with respect to other plants which used dryers not as effective with the thicker veneers. 3-ply ½" was known to be 50% stronger and 32% stiffer in one direction than 5-ply ½", but the 5-ply ½" was 90% stronger and 400% stiffer in the other.[9] This meant that greater care had

[9] These were the results which plaintiff obtained from tests made by the Oregon Forest Products Research Laboratory. Other tests show the same directional results with different values.

to be used in applying the 3-ply ½" in the proper direction with respect to the supporting members.

[4] In light of the admitted history the court is unwilling to conclude on the basis of one mill's performance and the use of thick veneers in other constructions, that the defendant was obliged to conclude that other mills—the industry generally—could produce a uniformly satisfactory product in the 3-ply ½" construction. Likewise the court is unwilling to infer from the fact that some of the defendant's members had economic motives for opposing the use of 3-ply ½" that those motives were the defendant's motives and therefore evil.

Absent a bad purpose what was defandant's antitrust liability? It was responsible for the commercial standards which did affect adversely the marketing of plaintiff's product. Plaintiff's 3-ply ½" was suitable for inclusion in the commercial standards, but 3-ply ½" plywood did bear a poor reputation in the industry in 1958. Had defendant been vigilant, it might have concluded in 1958, or sooner, what it did conclude in 1962—that the bad reputation was unjustified.

[5] If intent and purpose are factors in the antitrust law, and the court believes they are[10] except

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[10] Sugar Institute v. United States, 297 U.S. 553, 56 S. Ct. 629, 80 L. Ed. 859 (1936); United States v. Columbia Steel Co., 334 U.S. 495, 68 S. Ct. 1107, 92 L. Ed. 1533. See also Roofire Alarm Company v. Royal Indemnity Company, E.D. Tenn. 1962, 202 F. Supp. 166, affirmed 6 Cir., 313 F.2d 635, certiorari denied 373 U.S. 949, 83 S. Ct. 1678, 10 L. Ed. 2d 704, a case involving standards.

where per se violations are involved,[11] then the mere failure of one who is responsible for the adoption of a commercial standard to appreciate changes which make that standard obsolete and to take immediate and effective action to alter it, does not amount to a conspiracy to restrain trade. Any system of standards pre-supposes that there are standard and non-standard items. Those who produce products which are not standard are to some extent penalized and trade is to some extent restrained. This much however is congressionally sanctioned[12] and the court is of the opinion that in the absence of a bad purpose, mistakes made in the formulation or maintenance of standards do not subject the one making the mistake to anti-trust liability.

If the defendant was guilty of a violation of the Sherman Act in failing to secure a change in CS 45-55 or in procuring the adoption of CS 45-60, it does not appear from the record here that such was the proximate cause of any damage to the plaintiff. It was not until November 14, 1960 that CS 45-60 became effective. The plaintiff has not met its burden of proving and it cannot be assumed that had defendant acted in accordance with plaintiff's requests a change in CS 45-55 would have been accomplished sooner than November, 1960. It is likely that it would have taken longer. CS 45-60 did reflect the opinion of the indus-

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[11] United States v. Patten, 226 U.S. 525, 33 S. Ct. 141, 57 L. Ed. 333 (1913) (price fixing).

[12] 15 U.S.C.A. § 272, Reorganization Plan No. 3, § 601. 11 F.R. 7877, 60 Stat. 1101, 15 C.F.R. Subtitle A, Part 10.

try. The change requested by plaintiff would have required a re-education of the industry which might not have been possible in the absence of the defendant's testing done in 1961 and 1962 and the Weyerhaeuser testing, the results of which were published in a trade journal in February, 1962.

[6] Prior to April, 1958, the defendant adopted a resolution to present amendment number two to CS 45-55 to the Department of Commerce.[13] This amendment provided that products could not be represented as conforming to the Commercial Standard unless so certified by an independent testing agency. Amendment two was adopted and made effective May 1, 1959. Prior to that date plaintiff did certify that its 3-ply ½" plywood conformed to the Commercial Standard. Following May 1, 1959, plaintiff could not make this certification, and although plaintiff, after May, 1959, employed the services of Timber Engineering Company, that agency would not certify that 3-ply ½" did conform to the Standard. Defendant at all times refused to certify that the 3-ply ½" met the Standard. For these reasons, after May 1, 1959, and as a result of CS 45-55 as amended, plaintiff was handicapped in the market because it could no longer avoid the effect of the Standard by self-certification.

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[13] The plaintiff did not prove that what defendant did with respect to Amendment No. 2 was initially directed at plaintiff. It was at some undisclosed time prior to April 21, 1958 that defendant's Management Committee adopted its resolution to sponsor Amendment No. 2. The record does not show that at the time this action was taken the plaintiff was in production (which commenced in November, 1957), or that the defendant knew that plaintiff was going to self-certify the 3-ply ½" plywood produced by it.

When defendant started to procure Amendment No. 2, manufacturers were certifying that products conformed to the Commercial Standards, which did not in fact conform, and as indicated the plaintiff was one of these. The certifications of inferior or defective plywood could result in a fraud on the public and would tend to undermine confidence in the Standards and the plywood industry. If CS 45-55 was believed by defendant to be reasonable in 1959, then action taken to make it effective would not be unreasonable. Consequently the court cannot find that Amendment No. 2 was unreasonable or that its adoption was procured by defendant with an intention to unlawfully restrain trade.

Having so found it is unnecessary to pass on the problem of the statute of limitations or to discuss the many damages problems presented by the proof.

All motions to strike on which ruling was reserved are denied. All objections to evidence on which ruling was reserved are overruled.

This opinion, the supplemental findings and the agreed facts in the pre-trial order constitute the court's findings of fact and conclusions of law.

Counsel for defendant shall prepare and submit a judgment not inconsistent with this opinion.

SUPPLEMENTAL FINDINGS

[7] Plaintiff argues that the defendant refused to provide quality control services, inspection and cer-

tification except upon unreasonable conditions. At the time defendant procured the adoption of Amendment No. 2 to CS 44-55 it was doing substantially all of the softwood testing done in the United States. It represented to the Department of Justice and to the Department of Commerce that it would test the products of non-members at reasonable rates. Plaintiff inquired about the testing service and was advised to become a member of the defendant. Later, however, defendant did offer to provide the services for $775.00 per month or 35c per thousand feet, whichever was greater. It refused to permit plaintiff to use its grade stamps.

Plaintiff urges that the quoted price was unreasonable using as the basis of its argument the fact that defendant's dues were 75c per thousand square feet; that only 15c per thousand square feet was spent in technical activities including quality control and the remainder in promotion and other purposes. The price quoted defendant was greater than the calculated average cost per 1,000 square feet in defendant's whole operation. It is not shown however that defendant's actual cost of testing in a plant with a small production would have been less than the quoted price. For this reason defendant's quoted price was not shown to be unreasonable.

Defendant had a right to deny to one not a member the use of its trade marks even if it did furnish the testing service. Plaintiff was not denied membership on the same terms as other members, and if it did not

want to pay its share of the costs of defendant's promotion, it was not entitled to benefit from it. Plaintiff did secure the services of Timber Engineering Company for inspection and certification purposes.

It is therefore concluded that the defendant did owe the plaintiff a duty of testing at a reasonable cost; that there was no proof that the terms of defendant's offer were unreasonable; that in any event the plaintiff did not prove the defendant's failure in this respect proximately caused any damage since plaintiff did secure the services of another testing agency.

If the evidence on the matter of the testing services was introduced to prove defendant's intent to drive plaintiff out of the market, the court finds that it does not serve that purpose. The real dispute between the parties was the issue of the 3-ply ½". Plaintiff felt persecuted because of defendant's actions on that issue and said harsh things about defendant, some of which may have been justified, but in any event ill will between the parties had developed by the time the testing problem arose and neither party wanted to deal with the other if there were any alternatives.

These conclusions are stated separately from the opinion in this matter because the plaintiff's contentions with respect to the testing are somewhat at variance with plaintiff's general theory. Plaintiff lost money in every year of operation. It attributed the losses to its production of items other than 3-ply ½".

Plaintiff's proof of damage was based upon projected production of nothing but 3-ply ½". Plaintiff did not want the 3-ply ½" tested unless defendant would certify it as commercial standard. The court cannot give weight to a claim based upon defendant's refusal to test a product which plaintiff strenuously urges it didn't want to make and on which it lost money. The plaintiff's case must stand or fall on what was done with respect to the 3-ply ½" plywood.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STRUCTURAL LAMINATES, INC., a corporation, *Appellant,* vs. DOUGLAS FIR PLYWOOD ASSOCIATION, a corporation, *Appellee.*	No. 21,941

[July 23, 1968]

Appeal from the United States District Court for the District of Oregon

Before: HAMLEY and CARTER, Circuit Judges, and *BOLDT, District Judge

PER CURIAM:

As stated in the final pretrial order, appellant's claim is grounded solely on an alleged *conspiracy* to restrain trade in violation of Section 1 of the Sherman Act (15 U.S.C. 1) by appellee and some or all of the members comprising the appellee association. Appellant admits its allegations, if proved, would not constitute a per se violation of the Sherman Act. Maple Flooring Manufacturers Association v. United States, 268 U.S. 563 (1925); Tag Manufacturers Institute v. FTC, 174 F.2d 452 (1st Cir., 1949). In argument and the briefs, appellant concedes that reasonableness of appellee's conduct and any restraint of trade resulting therefrom is the basis upon which determination of plaintiff's claim by the trial court, and review

thereof on this appeal, must rest. Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1910); Chicago Board of Trade v. United States, 246 U.S. 231 (1918); Roofire Alarm Co. v. Royal Indemnity Co., 202 F. Supp. 166 (E.D. Tenn., 1962), app. Dism. 313 F.2d 635 (6th Cir., 1963), cert. den. 373 U.S. 949 (1963).

The trial court specifically found (1) conspiracy was not shown by the evidence and, (2) appellee's conduct, and any restraint of trade resulting therefrom were reasonable under all of the circumstances existing at the time of the events in Question. Our review of the entire record discloses ample evidence supporting both findings of the trial court and no fact finding by the trial court is held clearly erroneous. Rule 52(a), Fed. R. of Civ. Pro.; Cataphone Corp. v. DeSoto Chemical Coatings, Inc., 356 F.2d 24, 26 (9th Cir., 1966); Sherrill v. McShan, 356 F.2d 607 (9th Cir., 1966).

Absence of bad purpose in appellee's conduct was merely a circumstance considered by the trial court, together with a variety of other facts found from the evidence, negativing conspiracy. We are satisfied the reference in the trial court's decision to intent and purpose, when reviewed in context, does not support appellant's contention that the trial court considered specific intent or evil purpose to be a prerequisite for recovery by appellant.

AFFIRMED.

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* Hon. George H. Boldt, United States District Judge, Tacoma, Washington, sitting by designation.

SUPREME COURT, U. S.

FILED

DEC 13 1968

JOHN F. DAVIS, CLERK

Case No. 747

In The
Supreme Court of the United States
OCTOBER TERM, 1968

STRUCTURAL LAMINATES, INC., a corporation,
Petitioner,

v.

DOUGLAS FIR PLYWOOD ASSOCIATION, a corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In The
Supreme Court of the United States
OCTOBER TERM, 1968

STRUCTURAL LAMINATES, INC., a corporation, *Petitioner*, v. DOUGLAS FIR PLYWOOD ASSOCIATION, a corporation, *Respondent*.	Case No. 747

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUMMARY OF ARGUMENT

(1) THERE IS NO GROUND WHICH WOULD SUPPORT OR JUSTIFY A REVIEW OF THIS CASE BY THE COURT.

(2) PETITIONER'S ALLEGED QUESTION IS NOT HERE.

ARGUMENT

(1) THERE IS NO GROUND WHICH WOULD SUPPORT OR JUSTIFY A REVIEW OF THIS CASE BY THE COURT.

As stated in Supreme Court Rule 19, the court has discretion to review cases by certiorari. Review is not a matter of right.

The criteria are set forth in Rule 19. None are applicable here.

This becomes plain on a consideration of the salient features of the case.

In paragraph 1 of the final pretrial order, petitioner's claim was grounded solely on an alleged conspiracy to restrain trade in violation of section 1 of the Sherman Act (15 USC 1) by respondent and some or all of the members comprising the respondent association.

The trial court considered the evidence and found no conspiracy, determined that the commercial standards activities of respondent before the United States Department of Commerce were reasonable and proper, specifically found that respondent and its members had no improper motive or evil intent toward petitioner, that the Association's failure to secure a change in CS 45-55, or its procuring of the adoption of CS 45-60, was not shown to have been the proximate cause of any damage to petitioner, and, further, that at all events any failure of respondent to test petitioner's products had not "caused any damage since petitioner did secure the services of another testing agency." (Opinion of Trial Court, Appendix A, pp. 25, 29, Petition for Certiorari in case at bar, hereinafter referred to as "Petition")

Below, in the Court of Appeals, each of petitioner's four assignments of error were challenges to the Findings of Fact. (See Petitioner's Opening Brief in Court of Appeals, p. 8, reproduced in Appendix A to this Brief of Respondent in Opposition.)

With respect to such challenge, the Court of Appeals concurred in the findings of the trial judge, stating (Opinion of Court of Appeals, Appendix B., p. 32 Petition):

> "The trial court specifically found (1) conspiracy was not shown by the evidence and, (2) appellee's conduct, and any restraint of trade resulting therefrom were reasonable under all of the circumstances existing at the time of the events in question. Our review of the entire record discloses ample evidence supporting both findings of the trial court and no fact finding by the trial court is held clearly erroneous. Rule 52(a), Fed. R. of Civ. Pro.; *Cataphone Corp. v. DeSoto Chemical Coatings, Inc.,* 356 F.2d 24, 26 (9th Cir., 1966); *Sherrill v. McShan,* 356 F.2d 607 (9th Cir., 1966)."

This brings into play the well settled rule of this court that where the facts "have been found in favor of the respondent by both courts below, we do not review them." *Page v. Arkansas Gas Corp.,* 286 U.S. 269, 271.

This court has consistently followed the practice of declining to review facts found by both lower courts of the federal system. And the court has frequently stated that the "concurrent findings of the two lower courts will be accepted without re-examination of the evidence." *Allen v. Trust Co. of Georgia,* 326 U.S. 630, 636; *Just v. Chambers,* 312 U.S. 383, 385; *Comstock v. Group of Institutional Investors,* 335 U.S. 211, 214; *Graver Tank & Mfg. Co. v. Linde Air Products Co.,* 336 U.S. 271, 275; *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.,* 340 U.S. 147, 153; *Berenyi v. Immigration Director,* 385 U.S. 630, 635.

Petitioner nevertheless invites this court to re-examine the evidence of the long eight-day trial and to reach conclusions from the voluminous record contrary to those reached by the two courts below. This cannot be done in these circumstances, certainly not "in the absence of a very obvious and exceptional showing of error." *Berenyi v. Immigration Director, supra,* p. 635. No such "very obvious and exceptional" error has here been shown, or attempted to be shown, by petitioner.

We respectfully submit that the foregoing principles of judicial review in this court dispose of this petition and, without more, justify its denial.

(2) PETITIONER'S ALLEGED QUESTION IS NOT HERE.

Petitioner says broadly "the question for consideration by the court is what are the duties of a trade association when it undertakes to formulate and promote a commercial standard" (Petition, p. 11, also p. 2).

That question is not here, but only the question of violation of section 1 of the Sherman Act, a question which, as noted above in part 1 of this brief, has been adversely determined on the facts by both courts below.

This court has long sanctioned the normal activities of trade associations, absent any preponderantly established proof of violation of the anti-trust laws: *Chicago Board of Trade v. U.S.,* 246 U.S. 231; *Maple Flooring Manufacturers' Association v. U.S.,* 268 U.S. 563.

A case factually similar to the one at bar involving failure to meet manufacturing standards is *Roofire Alarm Co. v. Royal Indemnity Company,* 202 F.Supp. 166 (1962), affirmed 313 F.2d 625 (C.A. 6, 1963) certiorari denied 373 U.S. 949 (1963). The bearing of the Sherman Act on the facts of that case was considered and no viclation was found.

The Plywood Association has always, along with many other industries subject to Commercial Standards promulgated by the United States Department of Commerce, had a legitimate interest in commercial standards for the products of its members. This interest or purpose is the protection of the consumer and its own reputation against sub-standard products. As pointed out by the trial court (Petition, p. 25) "any system of standards presupposes that there are standard and non-standard items." If it were a violation of the anti-trust law to exclude non-standard items, there could be no standards whatever, contrary to the intent of Congress. Since standardization is a lawful practice expressly authorized by Congress for consumer protection (15 USC §272; Reorganization Plan No. 3, section 601, effective July 16, 1946, 11 F.R. 7877, 60 Stat. 1110) and encouraged by the Department of Commerce (Code of Federal Regulations, Title 15, Subtitle A, Part 10, 47), any such standards promulgated by the Department of Commerce are presumptively valid unless shown to be unreasonable. Industry has no way of making its views unilaterally effective because "the Department of Commerce will not publish a standard or revise a published standard until satisfied that it is approved by the industry and other interested groups" (Opinion, trial court, Petition, p. 18). "The Department of Commerce will not publish one which is not accepted

as satisfactory by the producers and users" (Opinion, trial court, Petition, p. 22). Before approving a standard, the Department circularizes the trade, including consumer groups and interested government agencies. Hence a promulgated standard after such a wide search for concensus bears the mark of reasonableness as found by the proper government agency. Inaction on the part of respondent in not working for a change which petitioner desired, but which respondent did not consider wise, is not an unreasonable restraint of trade, because of the protective procedure of the Department of Commerce.

The trial court observed the many witnesses before it and refused to draw any inferences that respondent had a bad motive or an unlawful intent toward petitioner.

The judges of the Court of Appeals are "not authorized to substitute our judgment for that of the district court with reference to the inference properly to be drawn from such testimony." *Filger v. Plax Corp.,* 6 Cir., 261 F.2d 369, 371 (1958). "If the evidence is susceptible of different inferences, the inference-drawing is for the trial court not this court." *Weaver v. U.S.,* 10 Cir., 334 F.2d 319, 320-1 (1964).

The rule is applied with special and "peculiar" vigor in anti-trust cases in regard to findings of "design, motive and intent." *United States v. Edwards,* 5 Cir., 333 F.2d 575, 578 (1964).

Remarking that such determinations are for the trial court, and "not to be tried by us *de novo,*" the Fifth Circuit in the case just cited quotes from the anti-trust decision in *U.S. v. Yellow Cab Co.,* 338 U.S.

338, 341 (1949):

> "Findings as to design, motive and intent with which men act depend *peculiarly* upon the credit given to witnesses by those who see and hear them." (Italics supplied)

Here the trial court saw and heard them and found no unlawful intent.

As pointed out above, the broad question which petitioner poses above is not here; and the single question of conspiracy has been disposed of by both courts below.

CONCLUSION

Bluntly stated, the petitioner is seeking a review by the Supreme Court of the United States of the evidence before the trial court and the findings of the trial court. These factual issues have been resolved by both courts below and will not be reviewed here.

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 21,941

UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT
STRUCTURAL LAMINATES, INC.

vs.

DOUGLAS FIR PLYWOOD ASSOCIATION

(excerpt from p. 8 of Appellant's Opening Brief)

SPECIFICATION OF ERRORS

1. The District Court erred in finding that Appellee's refusal to include 3 ply ½ inch plywood sheathing as a Commercial Standard product was not a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

2. The District Court erred in finding that Appellee had not misrepresented 3 ply ½ inch sheathing to plywood buyers, users and others.

3. The District Court erred in finding that Appellee's conduct was not the proximate cause of damage to Appellant.

4. The District Court erred in finding that 3 ply ½ inch sheathing was not a permissible construction under Commercial Standard CS 45-55.